Zoning Board of Appeals 6:30 p.m. meeting October 3, 2013

The Hall, 2nd Floor, Memorial Hall Library, 2 N. Main Street, Elm Square, Andover

Present were: Brown (Chair); Boness (Acting Clerk); Bargnesi, Member; and Oltman (Associate Member).

While waiting for the Board members to arrive, Chair Brown informed the public that due to the petitioner being a ZBA member, they are holding this separate, special meeting. The Board always attempts to act fairly & impartially in all cases, no matter who the applicant is. He gave an overview of the ZBA public hearing process.

The meeting opened at 7:04 p.m.

Petition No.: 4052

Premises affected: 14 Henderson Ave

Petitioner: Magenheim

This is a continued public hearing. Brian Emmons, 12 Henderson Ave, questioned whether the Board had a quorum since only 4 members were present, rather than 5. Brown explained that the Petitioners agreed to a 4-member board and that a super majority is still required. Mr. Magenheim restated for the record that they agreed to a 4-member board and proceeded to give an overview of their in-ground pool proposal & the changes they made based on feedback from the initial public hearing: the setback along #16 Henderson Ave changed from 5' to 6' and from 5' to 11' along #12 Henderson Ave; the pool size decreased, the pool apron decreased from 5' to 3'; crushed stone, mulch & shrubbery were added to mitigate run-off & increase screening; 6' fence will remain part of the project; the setback to the Malone's home on Lupine Rd will be 15'; consulted 3 pool specialists who agree that the pool will minimize erosion, decrease run-off due to a ¼" apron pitch toward the pool to catch water & will not decrease home values in the neighborhood.

Brown noted the down gradient location of the hot tub at #12 Henderson & asked for the location of the proposed retaining wall & drainage system. Mr. Magenheim pointed out the wall at the edge of the lot line adding that the fence will be atop the wall. He emphasized that the Malone's lot is caddy corner to theirs & that the pool will not be visible due to the wall & fence. Further, the retaining wall will have a drainage system to catch run-off. Boness commented that for a pool without a deep end or diving board, the drawing is misleading questioning if the size of the pool changed. Magenheim agreed that the drawing is not scaled stating that the pool location changed, not the dimensions. Brown noted for the record emails from neighbors in support of the pool: Jesse Cooper, 10 Henderson Ave; Marybeth O'Reilly, address not included; George O'Reilly, 13 Henderson Ave. Brown then asked the public for questions or comments.

Pat Malone, Lupine Rd, asked for the hardship related to soil conditions, shape or topography. Mr. Magenheim stated that the shape of the lot and the location of the house on the undersized lot does not allow for the construction of a pool by right. Malone disagreed & read a statement that no hardship exists under the statute. Mrs. Magenheim argued that there is a misunderstanding of dimensions & setbacks and that the hardship is the shape of the lot with the house situated in the middle leaving narrow side yards on a corner lot. She added that there are/have been other pools in the neighborhood. Joseph Savastano, 11 Henderson Ave, submitted a statement in opposition due to lack of hardship & the adverse impact the pool will have on the neighborhood. Brian Emmons, resident of 12 Henderson Ave, representing his mother, Dagmar Emmons, owner of 12 Henderson Ave. He agreed that the Magenheims have the right to petition for a variance, but no right to be granted one, as a matter of law. There has been no expert testimony regarding the shape of the lot being unique. Larry Gibson, 19 Henderson Ave, spoke in support stating that the pool is not detrimental to the neighborhood, but it will improve the neighborhood. Claire Bishop, 16 Henderson Ave, spoke in support adding that it is a hardship to have a pool outside a bedroom window. Tyler Bishop, 16 Henderson Ave, also spoke in support. Brian Emmons, 12 Henderson Ave, submitted a White Paper written by Attorney John Witten.

Mrs. Magenheim restated the hardship adding that they are open to further discussion. The Board waived a site view. Bargnesi made a motion to close the public hearing. Boness seconded the motion & the Board voted (4-0) to close the hearing. Brian Emmons, 12 Henderson Ave, asked for a point of order: should Mr. Magenheim be present [since he is a member of the Board]? Brown stated that Mr. Magenheim has the right to be present at this public meeting. The Board then proceeded to deliberate.

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Oltman stated that the proposed pool on the corner lot with two front yard setbacks, only one side yard setback will meet the rear yard setback with the proposed 11'. The Board discussed which the side is & which is the rear. Oltman pointed out that it could change, however the setback is not met only once, therefore only one variance is necessary. Brown & Bargnesi agreed. Boness commented that it does not matter which lot line needs a variance, but that corner lots unto themselves are peculiar and a big factor in determining hardship, which this is. Brown added that it is similar to past cases adding that other hardship criteria include conditions giving rise to hardship that are unique to this lot & not typical of the neighborhood or zoning district. Bargnesi noted that not all the lots in the neighborhood are corners and such lots are affected by setbacks unlike the abutters. Brown agreed that a corner lot is burdened unlike other lots, is encouraged by the changes made to the proposal & understands the abutters' concerns. Oltman commented that the current proposal is better than the original since a clear effort was made to address concerns regarding setback, impervious area, run-off, & landscaping. Bargnesi made a motion to approve a variance from Art. VIII, Section 4.2.4 to install an in-ground pool that will not meet the minimum side setback with the condition that the pool be constructed in substantial conformance with the most recently revised certified plot plan received on 10/2/13 & that the pool apron/deck along the abutters' property lines be a maximum of 3' wide and that during construction no incursion onto or disturbance of any abutting lots. Oltman seconded the motion. Brown added the condition that the depth of the pool shall be a maximum of 5' deep and that no diving apparatus, slides, etc. shall be installed. With the aforementioned conditions, the Board voted (4-0) to approve the variance. Bargnesi will write the decision. Brown gave an overview of the legal deadline for filing a written decision & the appeal process.

Boness then made a motion to adjourn the special meeting. Bargnesi seconded the motion & the Board voted unanimously (4-0) to adjourn the special meeting. Brown announced that the Board will take a 10 minute break before opening the next meeting.